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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>RUBEN AVELINO,<br>Defendant and Appellant. | D041186<br><br>(Super. Ct. No. SCS167779) |

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

A jury convicted Ruben Avelino of one count of assault with a deadly weapon and by force likely to cause great bodily injury (Pen. Code,[1] § 245, subd. (a)(1)) and one count of battery with serious bodily injury (§ 243, subd. (d)). Avelino was granted probation on certain terms and conditions.

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1 All further statutory references are to the Penal Code unless otherwise specified.

Avelino appeals contending the trial court erred in admitting certain testimony regarding street gangs, that the prosecutor committed misconduct in making certain comments to the jury, that the evidence is not sufficient to support his convictions and that the trial court committed instructional error.[2] We will reject each contention and affirm.

STATEMENT OF FACTS

The events in this case involve an encounter between the victim and his friend and Avelino and two of his companions. In a manner similar to street gang clashes, Avelino and his companions were driving in a neighborhood, spotted the victim and stared at him. According to one of Avelino's codefendants, the victim "threw signs" and Avelino and his friends stopped to confront the victim. The first comments by Avelino and his group were, "Where are you from?" At that point a fight began during which the victim was beaten to the ground several times and ultimately struck in the head with a car club (anti-theft device). As Avelino and his accomplices drove off from the scene they were heard to announce "Southside" and "Roughnecks."

The fight in this case took place on the evening of April 12, 2002. At that time the victim, Ricardo Garcia and his teenage companion, Carlos Barraza, were walking near a gas station at 12th and Palm in the Imperial Beach area of San Diego County. At that

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2 Avelino also argues he was prejudiced by "cumulative error." Since we find no evidentiary or instructional error and any claim of error by the prosecutor is waived for failure to timely object, we find no basis for the cumulative error contention. Accordingly, we decline to discuss the issue in greater detail.

point Avelino, together with juveniles Sergio Aravalo and Marco Flores got out of a car, which had been driven by Avelino. They stared at Garcia and Barraza. The group then walked in the direction of Garcia and Barraza. The three young men were wearing baggy pants and each had his head closely shaved. Garcia warned his friend they were about to be attacked and placed a beer bottle he had been carrying on the ground.

Avelino and friends approached Garcia and Barraza. One of the men in Avelino's group asked "where are you from," which was interpreted as asking "what gang are you from."[3] Suddenly Avelino and his companions attacked Garcia and Barraza. Avelino hit Barraza several times, then joined with the others in hitting Garcia. Garcia was knocked to the ground several times. He was hit in the back of the head with a car club creating a wound that required eight staples to close. While the beating of Garcia was in progress, Avelino went to his car and called to his companions and said, "Let's go." As Avelino and his companions drove off someone yelled "Southside" and "Roughnecks."

A citizen who observed the fight flagged down a passing deputy sheriff. Deputy Sanchez arrived at the gas station and observed Garcia washing blood from a gash on the back of his head. Sanchez called for backup.

Deputy Vasquez arrived in response to the backup call. He observed a car nearby driving with the lights off. He stopped the car, which was driven by Avelino with

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[3] The evidence in the prosecution case is conflicting. The victim, Garcia had to be arrested in order to get him to appear as a witness. He was declared a hostile witness and gave testimony contrary to his statements to sheriff's deputies. Garcia acknowledged the statements he made to deputies were true, but expressed the inability to recall much

Aravalo and Flores as passengers. Avelino was wearing gloves. Flores and Aravalo had blood on their hands. The deputy found half of a car club locking device in the car.

Barazza was driven to the location where the car was stopped. He identified Avelino and the two others as the assailants.

A citizen who observed the fight had also observed Avelino's car stop and saw the occupants drop an object while someone in the car said "get rid of it." The citizen directed deputies to the location where they found half of a car club locking device.

Aravalo testified on behalf of Avelino. Aravalo's case had been adjudicated in juvenile court. He said he was in the car with Avelino and Flores when they saw Garcia and Barraza. Aravalo said Garcia was "throwing signs." He testified that when the fight started Garcia threw the first punch, hitting Avelino. Avelino then struck back. Aravalo said he was the one that went to the car, retrieved the club and used it to strike Garcia. Avelino was in the car telling them "let's go." Aravalo said he yelled "Southside," which meant a gang or a "crew." Aravalo testified he knew he could not be punished further as a result of his testimony since his juvenile case had been resolved. He admitted telling sheriff's deputies that he was a member of the "Southside" gang but denied that Avelino was involved with either Southside or Roughnecks.

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regarding the events. He claimed the phrase, "where are you from?" meant nothing to him.

## DISCUSSION

### I

### *GANG RELATED TESTIMONY*

In a very lengthy argument, Avelino claims the trial court's erroneous rulings on gang evidence resulted in the prosecution injecting "gang insinuations" that unfairly "spiked the flavor of the case." We find the trial court's rulings to be correct and find there is no basis for a claim of prejudice arising from those rulings.

The trial court's determination to admit evidence is reviewed on appeal for abuse of discretion. Under that standard we will not overturn an evidentiary ruling unless the record shows the trial court's ruling was outside the range of rulings, which could be made by a reasonable trial judge. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) Applying the abuse of discretion standard to this case demonstrates that the issue is not even close. Here the trial court thoroughly reviewed the issues, was very mindful of his duties under Evidence Code section 352 to avoid undue prejudice, and carefully tailored his rulings to admit relevant evidence which was not unduly prejudicial.

Before we discuss the specific rulings we are moved to note there was no improper use of so-called gang evidence in this case. Avelino has devoted many pages of briefing to the testimony, taken outside the presence of the jury, on whether an expert could testify as to the meaning of the statement, "where are you from?" in the context of this street encounter. Yet Avelino is forced to admit that *the expert never testified* about gangs, or the meaning of the statement. In other words, the opening brief rails at length

about a nonissue. It is claimed, however, that such ruling opened the door to prosecution insinuations of gang activity. That claim also utterly lacks support in the record.

The trial court conducted a hearing under Evidence Code section 402 to determine what testimony it would receive from the victim and whether an expert would be called. At that hearing the victim was uncooperative and claimed failure of recall as to most facts of the crime, although he did acknowledge he had been truthful in his statements to the sheriff's deputies. The issue presented at the hearing was what evidence would be permitted to deal with the events that triggered this particular encounter and the probable meaning of the statement "where are you from?" under the circumstances. It also addressed the significance of the declarations by the perpetrators, "Southside" and "Roughnecks."

The court concluded that there was not enough evidence that the Southside gang was "fully documented" or that "Roughnecks" was a subset of that gang. Accordingly, the court restricted any testimony that those were gang terms or that Avelino was a gang member. It did conclude, however, that the prosecution could put on evidence, in a restricted format, that the statement "where are you from," was a challenge and an act of claiming territory by the declarants. The expert who testified at the hearing said that in his experience a declaration of that sort almost always leads to a fight. Avelino contends the court erred.

We find the court's ruling to be sound. A lay jury might not understand how a fight such as this occurred. After all, strangers encountered each other on the street. One group stared at the other, then confronted the other group with the statement "where are

you from?" and then a fight started. Ordinary citizens might be hard pressed to understand how such meaningless activity could be the basis of a fight. The explanation offered by the prosecution expert at the hearing would have been helpful in assisting the jury. The trial court correctly found the evidence probative and not unduly prejudicial.

As we have indicated, however, the prosecution did not put on the expert. Hence one might ask, what is the problem? Avelino complains that such ruling lead to "insinuations of gang activity." We find no basis for such contention.

First, the trial court was correct. Second, it was the defense thereafter that asked for, and received permission to question the jurors about gangs. It was the defense that elicited from Barraza that he thought the statement "where are you from?" was a gang-type challenge. In fact it was the defense that explored a great deal of the so-called gang insinuations.

In the defense case Aravalo talked about Garcia "throwing signs." The Attorney General argues the defense committed invited error by introducing such evidence, (*People v. Wader* (1993) 5 Cal.4th 610, 657-658) and that we should apply the invited error doctrine to bar Avelino from raising the issue here. We decline to apply the doctrine. It appears that defense counsel tailored the defense strategy to respond to the scope of the evidence that was going to be admitted. Dealing with the case presented is not invited error. However, as we have indicated, the trial court correctly discerned the relevance of an explanation of the challenge uttered by Avelino's group and how it triggered a fight. The fact that it was the defense that first undertook to introduce evidence on the issue is not invited error. In fact, it was not error at all.

In short, our review of the record does not reveal any unfair prejudice in the nature and scope of the evidence surrounding the commencement of the fight in this case. Accordingly, we reject Avelino's claims of error.

II

*PROSECUTORIAL MISCONDUCT*

Avelino next contends the prosecutor committed repeated instances of misconduct during argument. Specifically he alleges the prosecutor argued facts not in evidence and misstated the law and facts. Avelino has waived the first claim of error by failure to object. As to the second claim of error we find any possible error to be harmless.

As we have previously noted the gang expert did not testify in the case before the jury. Inexplicably, the prosecutor quoted from some of the expert's testimony in closing argument. The defense did not object to such statements. It is well established that timely objection is required in order to preserve a claim of prosecutorial error during closing argument. (*People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Price* (1991) 1 Cal.4th 324, 447.) Clearly a timely objection would have permitted the trial court to take corrective action.

Avelino notes the absence of an objection on this issue and argues that any failure to object should be excused because the misconduct was of such magnitude that timely intervention by the trial court would have been futile. (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) We reject that characterization of the remarks. The prosecutor was clearly mistaken in her remarks. They did not inject any inflammatory material and to a large extent included material covered by other witnesses. We are convinced that the

trial court, by timely admonition, could have cured any error arising from the prosecutor's inaccurate statement.

Even if we treated the issue as properly preserved for review we would find the error harmless beyond a reasonable doubt. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 183.) The jury was correctly instructed on the law and their duty to decide the case based on the testimony of the witnesses and not the arguments of counsel. (CALJIC No. 1.00.)

Avelino did object to the prosecutor's comments regarding the principles of aiding and abetting. The prosecutor argued that the three people got out of the car first and approached Garcia. She continued, asserting that Avelino supplied the weapon, i.e., the car club, and that the only person who said that Garcia threw the first punch was Aravalo. Counsel objected that the prosecutor had misstated the evidence. The trial court overruled the objection.

Avelino cites to evidence principally supporting his defense. However, it is evident the record is confusing. Garcia largely recanted or failed to recall his earlier statements and was plainly a hostile witness. The prosecutor was, however, inaccurate as to the testimony regarding who threw the first punch since Garcia testified that he did so, whether or not that testimony was credible. As to the weapon, it was a car-locking device obtained from the car that was driven to and from the fight by Avelino. Plainly the three males in Avelino's car acted together in confronting Garcia and Barraza, and Avelino drove to the spot where the bloody portion of the car club was discarded. We believe it is a fair inference from these facts that the car club belonged to or was controlled by

Avelino. The prosecutor was entitled to draw such inference in her argument. (*People v. Lucas* (1995) 12 Cal.4th 415, 473.)

In sum, it appears that part of the prosecutor's objected to remarks were proper and part were in error. The trial court should have sustained the objection to the comment regarding who testified as to the first punch. That said, we do not find the error to be prejudicial. The jury was properly instructed as to the law. It was aware of its responsibility to determine what facts had been proved and that statements of counsel were not evidence. In light of the entire record, it is inconceivable that the erroneous statement as to who punched first prejudiced this defendant. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

III

*AIDING AND ABETTING*

Avelino makes a three-pronged attack on his convictions contending the evidence is insufficient to prove he was an aider and abettor in the use of a weapon and the infliction of injury, that the court failed to properly instruct on the principle of natural and probable consequences and that the court erred in answering a jury question. We will reject each contention.

*A. Sufficiency of the Evidence*

When we review a claim that the evidence is insufficient to support a conviction we apply the familiar substantial evidence standard of review. Under that standard we review the entire record drawing all reasonable inferences in favor of the trial court's decision. We do not make credibility decisions nor do we reweigh the evidence. In the

last analysis, our task is to determine if there is sufficient substantial evidence to support the decision reached by the trier of fact. (*People v. Rowland* (1992) 4 Cal.4th 238, 269; *In re Frederick G*. (1979) 96 Cal.App.3d 353, 365.)

The principal theory supporting Avelino's convictions is that he aided and abetted the other two men in the attack and the use of a weapon on Garcia. A person who aids and abets another in the commission of a crime is a principal in that crime. (§ 31; *People v. Durham* (1969) 70 Cal.2d 171, 181.) In order to be guilty as an aider and abettor, the person must act with knowledge of the criminal purpose of the perpetrator by act, advice, encouraging, promoting or facilitating the crime. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1160-1161.) Such person is not only liable for the offense for which he or she aids and assists, but also for any other crime that is the natural and probable consequence of the target offense. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.) In order to convict the aider and abettor of the nontarget offense, the prosecution must prove (1) the defendant acted with knowledge of the perpetrator's unlawful purpose; (2) acted with the intent to commit, encourage or facilitate the commission of the target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime; (4) the defendant's confederate committed a nontarget crime; and (5) the nontarget crime was the natural and probable consequence of the target crime for which the defendant provided assistance. (*Ibid*.)

A review of the record in this case, in the light most favorable to the verdict, supports the jury finding that Avelino was a principal in both of the offenses for which he was convicted. Avelino drove the car in which Aravalo and Flores were riding. During

that ride he and the others were observed staring at the victim. The jury could conclude that all three of the suspects got out of the car together to confront the victim. Regardless of who threw the first punch, it is clear the jury could believe the affray began as a result of the confrontation and challenge issued by Avelino's group. The weapon came from his car, was used during the fight in which Avelino was an active participant and Avelino drove the car to the place where the weapon was discarded. A reasonable jury could conclude that the attack on Garcia and Barraza was a group effort, motivated by some bizarre notion of turf and that Avelino was fully aware of the weapon and its potential use. The jury could reasonably conclude the use of the weapon to beat Garcia to the ground was a natural and probable consequence of the group assault. In any event, the jury was not required to accept the defense version of the facts and could reject his argument that he was merely a bystander waiting at the car when the weapon was being used.

*B. The Jury Instructions*

The jury was fully instructed on the elements of each offense and was instructed regarding the theory of natural and probable consequences by the use of CALJIC No. 3.02.[4]

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4 "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant guilty of the crime of assault likely to produce great bodily injury and battery causing serious bodily injury, as charged in Counts 1 and 2, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crimes of assault likely to produce great bodily injury and battery with serious bodily injury were committed; [¶] 2. That the

Avelino argues the trial court failed to accurately identify the target offenses in its instruction. The instruction identified assault and battery as the target offenses. The instruction continued that the jurors were required to find that assault with force likely to cause great bodily injury and battery with serious bodily injury were natural and probable consequences of the target offense in order to convict Avelino of those offenses. The instruction accurately described the target offenses and it is clear under the circumstances of this case that injuries could be inflicted and that a weapon, to wit: a car club, could be used. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1589.)

*C. The Jury Note*

During deliberations the jury sent a note to the court. The note stated: "If the defendant partakes in hiding the evidence (club) is he considered to have aided and abetted in the commission of the assult [sic] likely to produce great bodily harm. Or is it considered a separate incident? i.e: destroying evidence."

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defendant aided and abetted those crimes; [¶] 3. That a co-principal in that crime committed the crimes of assault likely to produce great bodily injury and battery with serious bodily injury; and [¶] 4. The crimes of assault likely to produce great bodily injury and battery with serious bodily injury were a natural and probable consequence of the commission of the crimes of assault and battery. [¶] You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crimes of assault likely to produce great bodily injury and battery with serious bodily injury were a natural and probable consequence of that target crime. Whether a consequence is 'natural and probable,' is an objective test based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

After lengthy discussions, the court and all counsel agreed on a response. Defense counsel stated, "I agree with the court's proposed response to note no. 1. I'm in agreement with giving that. I'm satisfied that that's a correct statement of the law." The court thereafter instructed the jury as follows:

> "[I]f you find that an assault has been committed, conduct subsequent to the assault having been completed, does not aid and abet the assault. [¶] If you find that a defendant attempted to suppress evidence against himself in any manner such as by destroying evidence or by concealing evidence, this attempt may be considered by you as a circumstance tending to show consciousness of guilt. However, this conduct is not sufficient basis to prove guilt and its weight and significance, if any, are for you to decide. [¶] The second question which is actually a continuation of the first, or is it considered a separate incident, i.e. destroying evidence. Answer: Defendant is not charged with destroying evidence or with being an accessory after the fact. Focus solely on the alleged crimes and do not speculate about other possible charges."

Avelino now contends the instruction was ambiguous and thus error. We deal briefly with that contention. First, defense counsel clearly agreed with the instruction. If the defendant felt the instruction was ambiguous or incomplete it was his duty to bring that concern to the trial court's attention. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) Where, as here, the defendant specifically and enthusiastically endorsed the court's instruction, he cannot now attack the instruction on appeal. (*Id*. at pp. 1133-1134.) In any event, the instruction correctly conveyed to the jury that the postcrime conduct could only be used to establish consciousness of guilt and properly admonished the jury as to the limitations of such use of the evidence. Even if the issue were not waived, we would find no error.

## DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McDONALD, J.